In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-48

LINDEN ODELL KAISER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a single oblique reference by a government witness to petitioner's prior incarceration constitutes reversible error.

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioner and three of four co-defendants were convicted on three counts of theft from an interstate freight shipment, receiving and concealing a stolen motor vehicle, and conspiring to commit interstate theft, in violation of 18 U.S.C. 659, 2312, 2313, and 371. Petitioner was sentenced to ten years' imprisonment on Count One and to five years' imprisonment on Counts Two and Three, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that John Gould, an ex-convict employed as a truck driver, was offered $5,000 by petitioner to leave the tractor-trailer he was

driving and to allow petitioner to hijack his cargo (Tr. 144-146). Gould reported petitioner's offer to the F.B.I., who set up surveillance of Gould's truck (Tr. 148, 255-256). F.B.I. agents saw petitioner hook a new tractor to Gould's trailer and drive the trailer away (Tr. 372-373). The agents trailed petitioner for about 60 miles and then arrested him (Tr. 374). Meanwhile, Gould handed over to law enforcement authorities $2300 petitioner had given him as part payment for his cooperation (Tr. 159, 162).

At trial Gould, when asked how the subject of his prior criminal record arose during his conversation with petitioner, gave the following response (Tr. 172):

> A. I—in talking to Mr. Kaiser, there are certain inflections, a certain phraseology, vernacular, words that a con would use that is understandable by another con. * * *

Immediately following Gould's reply, the court ordered the remark stricken and instructed the jury to disregard it.

Petitioner contends that Gould's reference, which could be construed to label him as an ex-convict, was so prejudicial as to deny him due process of law.[1] However, when presented with the question of possible prejudice arising from similar oblique and unsolicited references to a defendant's prior incarceration, the courts of appeals have consistently held that where, as here, the court promptly orders the offending testimony stricken and admonishes the jury to disregard it,[2] the

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[1] Petitioner did not testify at trial, so his credibility was not at issue.

[2] Prejudice may arise, however, where there is a delay in admonishing the jurors to disregard the improper evidence. *United States* v. *McMaster*, 343 F. 2d 176 (C.A. 6), certiorari denied, 382 U.S. 818, rehearing denied, 382 U.S. 1000. There was no such delay in the instant case.

error is cured, and there is no ground for granting a mistrial. *Gorman* v. *United States*, 380 F. 2d 158 (C.A. 1); *United States* v. *DeLarosa*, 450 F. 2d 1057 (C.A. 3), certiorari denied *sub nom. Baskin* v. *United States* and *Noel* v. *United States*, 405 U.S. 927 and 957; *Russell* v. *United States*, 429 F. 2d 237 (C.A. 5); *United States* v. *Lomas*, 440 F. 2d 335 (C.A. 7), certiorari denied, 404 U.S. 842.

Marshall v. *United States*, 360 U.S. 310, relied upon by petitioner (Pet. 9-11, 13), is not in point. There this Court held that exposure to detailed news accounts of a defendant's prior criminal record so prejudiced the jurors that defendant could not receive a fair trial. Unlike the prejudicial news accounts in *Marshall*, the reference here was so vague and fleeting as to be capable of expungement from the jury's consideration by the court's timely cautionary instruction.

Similarly, petitioner's reliance (Pet. 16-18) on *United States* v. *Rinaldi*, 301 F. 2d 576 (C.A. 2), is misplaced. In *Rinaldi*, a witness was directly asked by the prosecutor whether to her knowledge the defendant had ever been convicted of a crime and answered in the affirmative. Here, the remark complained of was neither solicited by the prosecutor (Pet. App. A), nor was the subject pursued once the remark had been made. It was, on the contrary, simply volunteered by the witness.

The other cases petitioner relies on as creating a conflict between circuits are similarly inapposite. In both *Helton* v. *United States*, 221 F. 2d 338 (C.A. 5), and *United States* v. *Clarke*, 343 F. 2d 90 (C.A. 3), inadmissible evidence of prior drug use or sale was elicited in cases involving other drug offenses. In *Odom* v. *United States*, 377, F. 2d 853, 859 (C.A. 5) one of

the arresting officers testified that he "had seen Mr. Odom come in and out of jail * * * for approximately a year and a half." This reference by a police officer to repeated prior criminality contains a risk of prejudice that is absent in the present case.

In this case we have a statement which directly concerns the speech patterns of the witness, Gould. It at most indicates that Gould thought the petitioner might understand a certain argot. It is not direct testimony that petitioner had a criminal record. There is thus no incurable prejudice, and no conflict with the opinions cited from other circuits. In any event, Gould's error in arguably referring to petitioner's prior incarceration, even if not completely cured by the court's timely cautionary instruction, would still be harmless error in view of the overwhelming evidence of petitioner's guilt. See *Harrington* v. *California*, 395 U.S. 250, 254; *Chapman* v. *California*, 386 U.S. 18, 24.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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